



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC NO. JR 17 OF 2017**

**IN THE MATTER OF: ORDER OF LAND PORTION NO.KAMITI/ANMER/8300**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....DEFENDANT/RESPONDENT**

**EXPARTE**

**PETER MWAURA GIKONYO.....1<sup>ST</sup> APPLICANT**

**GEORGE KARANJA MBURU.....2<sup>ND</sup> APPLICANT**

**SOLOMON KIUNA KAIRIE.....3<sup>RD</sup> APPLICANT**

**AND**

**EUNICE KAGENDO NJUE.....INTERESTED PARTY/APPLICANT**

**RULING**

By a **Notice of Motion** Application dated **6<sup>th</sup> April 2018**, the Ex parte Applicants sought for various Judicial Review Orders amongst them an Order of **Certiorari**, an Order of **prohibition**, a declaration that the Respondent had no jurisdiction to hear and determine matters pertaining to the suit property, a declaration that the Respondents acted *Ultra Vires* and finally that the Costs of the Application be paid by the Respondent in any event.

It is important to note that before the substantive Application was filed in Court, the Applicants had sought for leave to file the Application to which the Court had granted the same. When the matter first came up for hearing on **17<sup>th</sup> April 2018**, **Mr. Wahome**, Counsel for the Exparte Applicants informed the Court that they had not served the Application as they were trying to resolve the matter out of Court, to which the Court granted the parties time and gave them a mention date for **25<sup>th</sup> June 2018**, for further direction.

The matter once again came up for mention on **25<sup>th</sup> June 2018**, and **Mr. Wahome** was present and **Mr. Wambugu** appeared for the Respondent. However the parties informed the Court that they had not reached a settlement. While **Mr. Wahome** sought for a hearing date, **Mr. Wambugu** sought for time to file a **Replying Affidavit** to which the Court granted the same. A further hearing date of **31<sup>st</sup> July 2018**, was granted and on this day, **Ms. Nyawira** holding brief for **Mr. Wambugu** again informed the Court that parties were negotiating and sought for more time. Once again when the matter came up for hearing on **11<sup>th</sup> October 2018**, **Mr. Mbuthia** appearing for the Respondent sought for more time to file the Replying Affidavit. Once again the matter came up for hearing on **27<sup>th</sup> November 2018**, and the Respondent had not filed a **Replying Affidavit**. However, the Court directed parties to canvass the Application by way of written submissions and gave the Respondent leave to file a **Replying Affidavit**.

When the matter came up for mention on **11<sup>th</sup> March 2019**, this Court was informed by **Mr. Wahome** Counsel for the Ex parte Applicants that the Respondent had withdrawn by way of **Gazette Notice** the contentious **Notice** subject to this Judicial Review proceedings and the decision they were contesting had been overtaken by events as such the reliefs sought had also been overtaken by events. They therefore abandoned the Judicial Review reliefs sought but prayed for costs.

**Mr. Wambugu** appearing for the Respondents also informed the Court that they had withdrawn the contested Kenya Gazette Notice and the Judicial Review is now settled. He however objected on the issue of costs and stated that each party should bear their own costs. It was Mr. Wahome's contention that costs follow events and as the Respondent has conceded and withdrawn the Kenya Gazette, and being that they had made several appearance and the Respondent having taken a stand that it will oppose the Application, they are entitled to Costs.

The Court then directed the parties to file written submissions on the issue of costs and in compliance with the said directives, the parties filed their respective written submissions.

The Court has now carefully read and considered the submissions of the parties herein and it is the Court's finds that the only issue for determination is whether the Ex parte Applicants are entitled to costs of the proceedings.

The Court has carefully laid out the sequence of events, that led to withdrawing of the particular Judicial Review proceedings. It is not in doubt that there was a substantive **Notice of Motion** on the Judicial Review that was filed and the Ex parte Applicants sought for Judicial Review Orders and costs of the proceedings in any event. Further it is also not in doubt that upon filing the Application, the parties had sought for time to settle the matter out of Court and as per the Court's record, the Applicants were agreeable to.

**Section 27** of the **Civil Procedure Act** provides that;

**“subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose of the aforesaid; and the fact that the Court or the Judge has no Jurisdiction to try the suit shall be no bar to the exercise of those powers.**

**Provided that the costs of any action , cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order”.**

From the above provisions of the law, it is trite that costs shall follow the event and in essence the successful litigant will always have the costs of the suit unless the Court in exercising its discretion finds otherwise. In this instant case, the Ex parte Applicants were seeking for various Judicial Review Orders and in so doing, the current proceedings were filed. As

already stated by this Court, there were various sequence of events that followed before this Judicial Review proceedings were filed. Further there is also a reason as to why the Ex parte Applicants filed the Judicial Review proceedings as they felt aggrieved.

The parties were given various opportunities to settle the matter out of Court but the same had failed. All these time the Ex parte Applicants had instructed their Advocates and therefore this Court will take **Judicial Notice**, that of course instruction fees plus filing fees were paid. Further as per the records, the Ex parte Applicants Advocate was always in Court and to that extend, it would mean that attendance costs were therefore incurred.

The Respondent has submitted that the Court should regard the conduct of all parties and also bear in mind the steps taken by all the parties in the case so as to appreciate the trouble taken by all the parties. The Respondent also submitted that it did not occasion a breach of the Applicants right as it acted with no deviation in pursuance of its mandate under the Constitution of Kenya.

It is not in doubt that the Respondent has withdrawn the Kenya **Gazette Notice** that was the basis of this Judicial Review proceedings as such though this Court would not want to pre-empt the basis upon which the said Gazette Notice would have been withdrawn, it is only fair to assume that after some housekeeping, the Respondent must have realized that the said Gazette Notice was not proper. It matters not whether or not it put up the Gazette Notice without having facts or whether it innocently infringed on the rights of the Ex parte Applicants. The said rights were nevertheless infringed upon and that necessitated the Ex parte Applicants to file this Judicial Review proceedings to be able to enforce their rights and in the long run they incurred costs which must be reimbursed by the Respondent. See the case of **Cecilia Karuru Ngayu....Vs...Barclays Bank of Kenya & Another [2016] eKLR**, where the Court held that;

**“At page 101 of the same book, Kuloba authoritatively states as follows:-**

**“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”**

**Section 27b of the Civil Procedure Act** provides the general Rule which ought to be followed unless for good reason to be recorded. This Court must therefore inquire as to whether there is a good reason to warrant the denial of costs to the Ex parte Applicants. The Court must therefore determine whether the Ex parte Applicants are the successful party.

The Ex parte Applicants having sought for the Judicial Review proceedings informed the Court that the Respondent withdrew the Gazette Notice and therefore their prayers had already been overtaken by events. In determining the issue of costs, the Court is not only required to look at the conduct of the parties. The Court is also required to look at the circumstance that led to the institution and the circumstances that led to the termination. See the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (supra)**

**“To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.<sup>[11]</sup> In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.<sup>[12]</sup>”**

Having come to a conclusion that costs are at the discretion of Court, the Court holds and finds that the Exparte Applicants are entitled to the costs of this Judicial Review proceedings. Even though the Respondent did not oppose the Application, the court concurs with the Applicants that it had intimated that it intended to oppose the Application. Furthermore the

Court had already set the Application down for hearing when it directed parties to canvass the Application by way of written submissions. The failure by the Respondent to file the **Replying Affidavit** and the withdrawal of the Gazette Notice did not affect the costs that had already been incurred by the Exparte Applicants. Further the Respondent has not given any reason with regards to the Applicants as to why the costs should not be awarded. On the contrary, when the Respondent sought time to settle the matter, the Applicants willingly conceded to the said Application.

The Exparte Applicants have been able to achieve the reliefs sought and it matters not the manner in which those reliefs were achieved . See the case of **Joseph Oduor Anode...Vs...Kenya Red Cross Society [2012] eKLR**, where the Court held that;

**“In Devram Manji Daltani .vs. Danda [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted. In Mr Kuloba’s view the defendant’s conduct of remaining silent when informed of the intention to withdraw the applicant militate against award of costs. Whereas I agree that out of courtesy, the defendant should have responded to the said intimation in order to avert the incurrence of further costs, that silence cannot affect the costs that had already accrued in respect for example to instructions to oppose the application and steps undertaken towards the same such as the filing of grounds of opposition. I associate myself with the holding in Alexander-Tryphon Dembeniotis vs. Central Africa Co. Ltd [1967] EA 310 where the Court expressed itself as follows:**

**“The defendant is entitled to put his back against the wall and to fight from every available point of vantage. It would be extremely hard on defendants if as a rule they were told, at the end of the trial: “You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action”... Full costs should be awarded to a plaintiff who has succeeded in the main purpose of his suit and obtained the precise form of relief he wanted...It is not on every issue in a suit that success will bring a right to the costs of that issue. Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and he should not be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue. Here he has not only substantially succeeded in the main purpose of the suit, but he has obtained the full relief claimed that was the cancellation of the agreement. He obtained the precise form of relief he wanted, and it is immaterial that the other issue is left undecided, because whichever way that issue falls to be decided it cannot affect the result”.**

The general principle being that costs follow the events and unless the Court is satisfied otherwise, it must follow the general rule. This Court holds and finds that there has been no reason to depart from the general rule as none has been provided to its satisfaction.

The Upshot of the foregoing is that the Exparte Applicants are the successful litigants as their reliefs sought in the Judicial Review Application though not granted by the court, the contentious Gazette Notice that brought about this Judicial Review was withdrawn and thus, they are entitled to costs.

This Court having now carefully read and considered the pleadings, the submissions of the parties herein, holds and finds that the Exparte Applicants are entitled to costs and consequently, their prayer for costs is merited and the same is allowed. The Exparte Applicants are therefore awarded costs of the proceedings.

It is so ordered.

**Dated, Signed and Delivered at Thika this **11<sup>th</sup>** day of October, 2019.**

**L. GACHERU**

**JUDGE**

**11/10/2019**

In the presence of

No appearance for Exparte Applicants

No appearance for Respondent

No appearance for Interested Party

Lucy - Court Assistant

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**11/10/2019**